



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Adirondack Construction Corporation

File: B-280015.2

Date: August 25, 1998

David G. Anderson, Esq., Couch, White, Brenner, Howard & Feigenbaum, for the protester.

Walter G. Breakell, Esq., Breakell & Couch, for Charles A. Gaetano Construction Corp., an intervenor.

Joseph J. Cox, Esq., and Madeline Shay, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of rejection of late bid is denied where, while the agency changed the bid opening room less than 1 hour before bid opening, the agency reasonably determined that the bidder's actions significantly contributed to the late receipt of the bid.

DECISION

Adirondack Construction Corporation protests the rejection of its late bid under invitation for bids (IFB) No. DACA51-98-B-0014, issued by the U.S. Army Corps of Engineers, for renovation of a building in Rome, New York. Adirondack contends that actions by the agency were the paramount cause for the late receipt of Adirondack's bid.

We deny the protest.

The IFB provided that "[s]ealed offers in original and 2 copies to perform the work required are due at the place specified in Item 8 by 1400 hour[s], local time [on May 6, 1998]." IFB, Standard Form 1442, Item 13.A. Item 8 designated the place for receipt of bids as NYDUS Army Corps of Engineers, 26 Federal Plaza, Room 1843, New York, New York. Adirondack's representative (Mr. D) arrived at 26 Federal Plaza and located room 1843 approximately 1.5 hours before the 2 p.m. bid opening time.

Room 1843 is a large room that contains some 20 modular cubicles constructed of partial walls approximately 5 feet in height. According to affidavits submitted by Mr. D, after entering the room, he observed an empty desk to the left of the

entrance. He states that he asked a government employee near this desk "if this was the bid opening room for this job," and the employee responded that it was. Mr. D's Affidavit, June 17, 1998, at 1. When Mr. D asked for the person listed in the IFB as the one to contact for information, the employee reportedly stated that she was not in, and that everyone was at lunch. Referring to the desk, Mr. D states that he asked if "this was where we handed in the bids," and the employee answered that it was. Id. at 2.

According to the agency, there are three clocks in room 1843, all of which registered different times. The clock that Mr. D apparently saw was on a pillar (approximately 20 feet away) above the cubicle walls. He states that he noted the time on that clock as 12:40 p.m. and synchronized his watch with it.¹ As determined after bid opening, this clock was approximately 3 minutes slower than the clock that was actually used to determine the time for bid opening. Mr. D then went to a public telephone outside the restrooms, which were located in an alcove off of an adjacent corridor, to call Adirondack's home office to obtain prices to complete the bid forms. During this first telephone call to his office, Mr. D advised home office personnel of his distance from the room designated for receipt of bids (room 1843) and of the time on the clock he had seen in that room.² He continued making and receiving telephone calls until shortly before 2 p.m.

Unbeknownst to Mr. D, at 1 p.m., the bid opening official (who was also the person listed in the IFB as the contact for information) learned that room 1841, a room adjacent to room 1843 that the agency had intended to use for the actual opening of bids, would not be available at 2 p.m. She then reserved another room (1802) located in the same corridor as the telephone/restroom alcove where Mr. D was making his calls, approximately 36 feet away from the telephone and approximately 80 feet away from room 1843. The bid recorder then made three signs stating that bid opening for this solicitation would be in room 1802 and, at some point between 1:30 and 1:45 p.m., the recorder posted the signs outside rooms 1843 and 1841; at 1:45, the bid recorder accompanied the bid opening official to room 1802.

Another contracting office employee volunteered to stand in the hallway near the telephone/restroom alcove to direct bidders to room 1802. At 1:58 p.m., according

¹While Mr. D's two affidavits do not mention synchronizing his watch to the pillar clock, protester's counsel represents that Mr. D in fact did so.

²The record includes the telephone records for this and other telephone calls between Mr. D and his office. While there is no direct way to correlate the time on the telephone records, the time on the clock in room 1843 that Mr. D had observed, and the time on the clock in room 1802 where bids were actually opened, it appears that the time on the clock in room 1802 is substantially the same as that reflected in the telephone records.

to the clock in room 1802, the bid opening official announced that the time scheduled for bid opening was approaching and that any hand-carried bids should then be turned in. She advised those in attendance that hand-delivered bids submitted after 2 p.m. would be late and not accepted for consideration. Shortly after this announcement was made, representatives of two contractors (but not the protester) entered the room and turned in their bids.

According to the telephone company billing records, Mr. D received a telephone call from his home office at 1:55 p.m., which lasted 4.8 minutes. He states that, during this call, he obtained the final figures necessary to complete the bid forms, filled them in and double checked them. Based on what he believed to be the time indicated on the room 1843 pillar clock, Mr. D believed he finished the call with some 4 minutes to spare. By the clock in room 1802, however, he had less than 1 minute remaining before the 2 p.m. bid opening time. Mr. D started toward room 1843 and was stopped by the volunteer employee, who informed Mr. D of the room change and directed him to room 1802. Mr. D then ran to room 1802. It was 2 p.m. on the clock in room 1802, after the bid opening official had announced that it was time for bid opening, that Mr. D arrived and submitted his bid. The bid opening official marked it as received 20 seconds after 2 p.m. After all other bids and the government estimate were announced, the bid opening official opened Adirondack's bid and found that it was lower than any of the bids that had been submitted prior to 2 p.m. Shortly after bid opening, Mr. D showed contracting officials that the clock in room 1802 was approximately 3 minutes faster than the pillar clock he had looked at in room 1843. The agency subsequently determined to reject Adirondack's late bid and Adirondack has protested this determination.

As a general rule, bidders are responsible for delivering their bids to the proper place at the proper time, and late delivery of a bid generally requires its rejection even if it is the lowest bid. J.C.N. Constr. Co., Inc., B-270068, B-270068.2, Feb. 6, 1996, 96-1 CPD ¶ 42 at 3; Aztec Dev. Co., B-256905, July 28, 1994, 94-2 CPD ¶ 48 at 3. A bid is late if it does not arrive at the office designated in the solicitation by the time specified. Federal Acquisition Regulation (FAR) § 14.304-1; Aztec Dev. Co., supra. Late hand-carried bids may be considered, if it is determined by the government that the late receipt was due primarily to government mishandling after receipt at the government installation. FAR §§ 14.304-1(a)(2), 52.214-7(a)(2); Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 at 3; AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 at 3. While the FAR provision applies explicitly only to instances of mishandling of bids after receipt at the government installation, we have consistently applied the same analysis where, as here, the government mishandled a significant element of the bid receipt process, even if that occurred prior to actual receipt of the bid by the government. See, e.g., PLAN-Industriefahrzeug GmbH & Co., B-254517, Dec. 23, 1993, 93-2 CPD ¶ 338 at 2-3.

In determining relative responsibility for the late receipt of a bid, all of the circumstances surrounding its delivery should be considered to determine whether the bidder acted unreasonably. See Dale Woods, B-209459, Apr. 13, 1983, 83-1 CPD ¶ 396 at 3. If the bidder significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility for ensuring delivery to the designated place for receipt by the proper time, the late bid should generally not be accepted. Aztec Dev. Co., *supra*, at 3-4; John Holtman and Sons, Inc., B-246062, Feb. 13, 1992, 92-1 CPD ¶ 187 at 2. In particular, a bidder significantly contributed to the late delivery if it failed to allow enough time to permit a timely submission. See Wyatt and Assocs., B-243349, July 1, 1991, 91-2 CPD ¶ 5 at 2-3.

Under the governing language in the FAR, it is the procuring agency, in the first instance, which should make the determination concerning whether its action was the primary cause of the bid's late receipt. FAR § 14.304-1(a)(2). It is within the agency's discretion to determine that its actions were the primary cause of the late receipt (and therefore to accept the late bid) or, as here, to conclude that its actions did not constitute the primary cause (and therefore to reject the bid), and our Office will not substitute its judgment in this regard, but will review the reasonableness of the agency's determination.³

Here, Adirondack contends that the agency was the paramount cause of the late receipt of its bid because the agency changed the bid opening room without providing adequate notice to prospective bidders and because it used a clock to determine bid opening time which was set 3 minutes faster than the clock in the original bid opening room. The agency agrees that its change in bid opening rooms less than 1 hour before bid opening was improper. Where the identified room is unavailable, the contracting officer should, at a minimum, telephone all known bidders and advise them of the change of location, or advise that bid opening would be postponed and issue a written amendment designating a new time and place. Dale Woods, *supra*; Avantek, Inc., B-185248, Feb. 5, 1976, 76-1 CPD ¶ 75 at 5.⁴

³A key element in our review of the reasonableness of the agency's determination will be concern about whether acceptance of a late bid could cast doubt on the integrity of the sealed bidding process. See, e.g., Pacific Tank Cleaning Servs., Inc. B-279111.2, July 1, 1998, 98-2 CPD ¶ ____ at 3-5 (in absence of acceptable evidence of timely receipt and subsequent agency control at the installation, discovery of bid well after bid opening was insufficient to justify agency determination that its mishandling was the paramount cause of late receipt). In the case at hand, however, the agency's decision to reject the protester's late bid does not implicate the integrity of that process.

⁴In this regard, the agency could have kept bid receipt in room 1843 and simply moved bid opening to another place after the time for receipt had passed, it could
(continued...)

However, the agency contends that, under the circumstances of this case, the late bid should not be accepted because the protester significantly contributed to the late delivery. We conclude that the agency's position is reasonable.

We recognize that the protester's representative initially took prudent steps by arriving 1.5 hours prior to bid opening time and locating the room designated for receipt of bids. However, he then took action which significantly contributed to the late receipt of his bid, starting with his assumption that the clock he saw in the bid receipt room was the official clock for determination of the time for bid opening. While he verified that the room was correct for bid opening, at the time he checked his watch, he did not seek to verify that the clock he saw was actually the official time. This action was unreasonable in view of the fact that the room was large and filled with cubicles, any one of which could have contained the official clock for purposes of determining bid opening time. Since the bid opening official's declaration of bid opening is determinative of lateness unless it is shown to be unreasonable under the circumstances, J.C. Kimberly Co., B-255018.2, Feb. 8, 1994, 94-1 CPD ¶ 79 at 2, Mr. D had no basis to assume that the declaration of bid opening time would be based on the clock which he had observed in room 1843. Second, it does not appear that he was paying close attention to the time reflected on the clock in room 1843 or on his watch, ostensibly synchronized to that clock.⁵ Finally, and most importantly, he spent virtually the entire time leading up to 2 p.m. at (even when not on) the telephone and did not leave for the original bid opening room until very close to bid opening time. He apparently never left the telephone alcove until he hung up from the last call with less than 1 minute to reach the original bid opening room. As a result, he did not see the signs posted and thus did not learn of the room change until literally the last minute (according to the clock in the actual bid opening room), when he encountered the volunteer employee.

⁴(...continued)

have posted additional signs and personnel to better identify the new bid opening room, or it could have postponed bid opening to another day or a later time that day.

⁵For example, in his statement made the day of bid opening, Mr. D averred that the clock in room 1843 registered 12:40 p.m., and that he then walked to the telephone and advised his office of the time in room 1843. The telephone billing records, however, indicate that this call took place at 12:26 p.m. Similarly, Mr. D states that he received his last telephone call from the home office at 1:40 p.m. Since the telephone records show that this call lasted less than 5 minutes, if his statement about when the call began were accurate, he would have had ample time to return to room 1843, learn of the change and reach room 1802. If we assume that the telephone records are accurate at least as to the length of the call, his statement that his call was received at 1:40 p.m. thus casts doubt on the accuracy either of his watch or of his recollection of the time events occurred.

In sum, we conclude that the agency reasonably determined that Adirondack, particularly by failing to ensure that it left sufficient time before bid opening to submit its bid, significantly contributed to the lateness of its bid. See Monthei Mechanical, Inc., B-216624, Dec. 17, 1984, 84-2 CPD ¶ 675 (where bidder left only 30 seconds before bid opening to submit its hand-carried bid, agency's movement of bid depository box, from customary place in building foyer to the actual bid opening room prior to bid opening, was not the paramount cause for the late submission of the bid). The agency's actions here, though improper, were not the primary or paramount cause for the late receipt of the bid. See Imperial Maintenance, B-218614, July 26, 1985, 85-2 CPD ¶ 94 at 3. Accordingly, the agency's rejection of Adirondack's bid was reasonable.

The protest is denied.

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